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NO. 81-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETER JAMES SCOTT, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the erroneous admission into evidence of prejudicial hearsay radio communications by purported co-conspirators, over proper and timely defense objection, may properly be excused as harmless error under Rule 52(a) of the Federal Rules of Criminal Procedure, despite the Government's failure to authenticate the alleged communications or to prove knowing participation in the conspiracies alleged in the indictment?

(2) Whether the circumstantial evidence in the record is insufficient to support the convictions?

LIST OF PARTIES

The parties to this proceeding in the Court of Appeals were as follows:

Defendants-Appellants: Peter James Scott, Don Richard Rainey, Steven Clyde Watson, Daniel Edwin White, Gary Lee Anderson, Charles Joseph Howard, Julio Rodrigues, Pedro Aparicio, Luis Garcia, Charles Thomas Pollard, Fermin Gomea Polo and Lawrence W. Griffith.

Plaintiff-Appellee: United States of America.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Peter James Scott, Daniel Edwin White, Pedro Aparicio, Charles Thomas Pollard and Lawrence W. Griffith respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on June 18, 1982.

OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Scott*, 678 F.2d 606 (5 Cir., 1982), and is reproduced in the Appendix of this petition, together

with the judgment and the order denying the petition for rehearing.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on June 18, 1982. All Petitioners filed a timely petition for rehearing, which was denied on August 30, 1982. This petition for certiorari was filed within 60 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clause of the Fifth Amendment to the Constitution of the United States and the following Federal criminal statutes:

Title 21, U.S.C., section 846:

> *"Attempt and conspiracy*
>
> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title 21, U.S.C., section 841(a)(1):

> *"Prohibited Acts A*
>
> *Unlawful Acts*
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance * * * ."

Title 21, U.S.C., section 963:

"Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title 21, U.S.C., section 952(a):

"Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any [scheduled] controlled substance * * * ."

STATEMENT OF THE CASE

All five Petitioners, together with seven others whose convictions were reversed by the Court of Appeals for insufficient evidence, were indicted and ultimately found guilty by a jury in the United States District Court for the Southern District of Texas, Galveston Division, for conspiring to import and to possess with intent to distribute more than 15 tons of marihuana in violation of 21 U.S.C. sections 841(a)(1), 846, 952(a) and 963. The marihuana was discovered by the United States Coast Guard

aboard an abandoned shrimper, the LITTLE AL, seized in an area of the Gulf of Mexico known as the Bucanneer Rigs, a popular fishing spot approximately 26 miles southeast of Galveston, Texas (R. 5: 159-60). Petitioners and their seven companions were aboard two other vessels, the TYRANT III and the DORADO, seized by the Coast Guard approximately eight miles from the LITTLE AL (R. 4: 489-90). No trace of marihuana was discovered aboard either of these two vessels.

Moreover, the Government offered no direct evidence either that Petitioners had affirmatively joined in the conspiracies alleged or that any Petitioner had actually possessed or attempted to import the contraband discovered aboard the LITTLE AL. The case against all Petitioners was entirely circumstantial.

Less than a week before the Coast Guard seizures, Petitioner Charles Thomas Pollard inquired about pleasureboats for sale in the Freeport, Texas area, indicating that he intended to use the vessels as fishing charters and that he had "a [tax] write-off or something of that nature in mind" (R. 2: 141-44; 156-57). Pollard, accompanied by Petitioner Peter James Scott, inspected and eventually purchased for cash two Hatteras class sport fishermen, the TYRANT III and the DORADO (R. 2: 34-151). Both Pollard and Scott provided their correct names to the sellers of the vessels and did not attempt to conceal their identities (R. 2: 130-32), although no sea trials or execution of title papers were undertaken before transfer of the vessels to Pollard (R. 2: 51-52; 57-58; 117; 122-23). Thereafter, Scott and Petitioners Daniel Edwin White and Lawrence W. Griffith were seen at the marina where the DORADO was berthed (R. 6: 184-87; 204; 207-08).

On the morning of Sunday, April 5, 1982, the Galveston Coast Guard began intercepting a series of "unusual" radio transmissions on the 14.3670 megahertz frequency, as a result of instructions from the Miami Coast Guard, relayed through New Orleans, to monitor that frequency (R. 3: 219-232; 239). Quartermaster Jeffrey L. Huse, the Operations Duty Officer in the Operations Center of the Galveston Coast Guard station, logged the following transmission at the following times on Sunday, April 5 (R. 3: 250-56):

8:30 a.m.	("105" calling "115". "115" calling "105".)
8:40 a.m.	"We're moving out." (Sent "in the blind" by "115". No response from "105")
8:43 a.m.	(Communication established between "105" and "115")
	"105": "Have you seen your cousin?"
	"115": "No, I haven't seen Willie."
9:10 a.m.	"105" to "115": "Go to the next one." ("105" then called "116"; "105" and "115" came back and continued talking to each other, although confusion of frequencies made communication impossible.)
9:37 a.m.	"Go to channel 11 and use the two names that I gave you." Answer: "Roger 4." (Sender and receiver unidentified)
9:46 a.m.	"105" to "115": "I sent them out last night. I have got them on VHF. ETA should have been about 0200. Keep trying."

9:53 a.m. "105" to "115": "When you get to the point, anchor. I am going to find brother even if I have to go to his house." "115": "Roger 4."

12:53 p.m. "105" to "115": "Prepared to meet two boats. Number one and number two. Rendezous within the same hour, same position."

Apparently no further transmissions were monitored during the remainder of the afternoon and evening of April 5. However, the following transmissions were logged by Quartermaster Huse on the morning of Monday, April 6 (R. 3: 256-58).

6:30 a.m. (After numerous communication attempts) "115": "We have negative sighting but we have contact. It's spooky because they are out here. Last night we steamed downtown."

"105": "Stay put. We'll get a bird in the air. We'll find both of you and get you together. What is your heading now?"

"115": "Southeast during the morning but northwest now."

"105": "We'll be down in 30 to 45 minutes."

7:50 a.m. "115": "I'm about 50 minutes to scene and am going to channel 13."

"105": "Tell your friend, 13."

A Coast Guard helicopter searching "the same general area" of the Buccaneer Rigs where the LITTLE AL was discovered later in the day did not observe any

suspicious activity or vessels in the area when it flew over it shortly after 9 a.m. on April 6 (R. 4: 673-74; R. 5: 42).

Between 8 a.m. and noon on April 6, heavy Monday morning activity at the Operations Center prevented Quartermaster Huse from logging the precise times of various other communications. During that roughly four-hour period the following transmissions were recorded (R. 3: 259-62):

> "105": "Little Man just walked in and is personally going to take charge." ("105" then requested "115's" position, asking if he had on radar the "set of rigs * * * that looks like an airport approach")
>
> "115": "Oh, that's what you call Buccaneer Rigs."
>
> "115": "I am at 5622 and 1081.5. You know what I mean."
>
> "115": "I want to get the rendezvous over because we're low on food."

After concluding that the references to "5622" and "1081.5" in the preceding communications were LORAN (Long Range Aid to Navigation) coordinates, Quartermaster Huse plotted the resulting position and determined that it was a location approximately 8 to 10 miles south-southeast of the Buccaneer Rigs (R. 3: 261-62). Accordingly, a second Coast Guard helicopter on routine pollution patrol was diverted to the area shortly before 2 p.m. (R. 3: 379).

Thereafter, Galveston monitored the following radio communications on the 14 megahertz frequency (R. 3: 263-65):

2:00 p.m.	"105" to "115": "Give it all to Willie."
	"115" to "105": He can't take it all."
	"105": "Clean off the - - - -." (Transmission unclear: "catch," "hatch" or "deck")
2:25 p.m.	"115" to "105": "Red Stripe is here. The same dude."

At approximately the same time, on another frequency (Channel 9, VHF), Quartermaster Huse overheard communications between "Willie Willie" and "Dead End" and, approximately a minute later, either "Willie Willie" or "Dead End" repeated the message "Red Stripe is here." Then on the 14 megahertz frequency, "105" directed "115" to "Go take a ride with Willie Willie. Take all the papers off." Apparently some confusion followed this communication, and "105" then asked "115", "Is your friend there?", to which "115" responded "negative." "105" and "115" then agreed to attempt to communicate again on the same frequency at 7 p.m. that evening (R. 3: 264-65). "105" did attempt to call "115" at 7 p.m., with no results (R. 3: 265). During the same afternoon considerable numbers of communications from other vessels on the same frequencies were monitored by the Coast Guard (R. 3: 400-403).

When the second helicopter arrived on the scene at approximately 2:16 p.m. at an altitude of approximately 1,500 feet, it located a white fishing vessel approximately five miles south-southeast of the Buccaneer Rigs; it appeared to be stationary (R. 4: 608-09; 611). Upon investigating the helicopter crew discovered that the vessel in question was a shrimper, the LITTLE AL, at anchor and riding low in the water (R. 4; 611-14). Again climb-

ing to an altitude of approximately 1,500 to 2,000 feet, the helicopter crew observed two other vessels approximately ten miles southwest of their position which, upon investigation, proved to be the TYRANT III and the DORADO (R. 4: 615-18). As the helicopter initially approached the latter two vessels at a low altitude, they were approximately 200 to 300 yards apart, with the TYRANT III underway at a low rate of speed in a generally westerly direction and the DORADO apparently at anchor, with three people visible, two of whom appeared to be fishing (R. 4: 619-21; 695). The helicopter crew subsequently observed the TYRANT III come alongside the LITTLE AL, where it remained for approximately five minutes before getting underway on a generally southwesterly heading at a moderate rate of speed (R. 4: 623-25; 676-79).

A Coast Guard surveillance aircraft in the vicinity thereafter observed the TYRANT III and the DORADO come together stern to stern, remain together for a brief period, then rapidly get underway and make a rapid series of speed and course changes (R. 3: 423-27). The vessels then came together a second time, at which time the crew members of the aircraft saw a line running between them and also observed what appeared to be a long white object thrown from one of the boats (R. 4: 518-20). The object, a roll of plastic approximately four to five feet long, was subsequently retrieved by the helicopter crew, which had returned to the area following refueling (R. 4: 628; 621-32).

The Coast Guard subsequently boarded the LITTLE AL and discovered its cargo of marihuana (R. 5: 80-86). Leaving one member of the boarding party aboard for

security, the Coast Guard then proceeded to intercept the TYRANT III, approximately five miles from the LITTLE AL, where it was boarded and subjected to a safety inspection for approximately 20 minutes (R. 5: 89-95). Petitioner Lawrence W. Griffith identified himself as the skipper and stated that the papers for the vessel were on board the DORADO (R. 6: 82-83). After completing the inspection of the TYRANT III and discovering that it was "clean" the Coast Guard was then advised that the helicopter was escorting the DORADO back to the area for boarding and search (R. 5: 96-97). Petitioner Pollard identified himself as the skipper of the vessel, produced its papers and appeared "knowledgeable" about it (R. 6: 95-96). An inspection of the DORADO likewise revealed no contraband or any violations of law (R. 5: 100-101). Nevertheless, the Coast Guard base at Galveston instructed the boarding party by radio to escort both the TYRANT III and the DORADO back to Galveston (R. 5: 102-103).

Petitioner Griffith's fingerprints were eventually discovered on a chart of the Gulf of Mexico that had been taped to the chart table on the LITTLE AL, on a can of starter fluid recovered from a drawer beneath the bunk in the captain's quarters and on a jar of bayleaves in the galley above the sink (R. 7: 174-76). Petitioner Pedro Aparicio's palm print was found on a chart that had been taped to the chart table (R. 7: 150-52). The frequency numbers handwritten in ink on the channel selectors of the high-frequency radios discovered aboard all three vessels were, in a number of instances, identical (R. 7: 26-35).

At trial, before hearing the testimony of Quartermaster Huse concerning the radio transmissions intercepted on

April 5 and 6, the District Court excused the jury for the purpose of making a preliminary determination of the admissibility of such testimony, as required by *United States v. James*, 590 F.2d 575 (5 Cir. 1979) (en banc), *cert. denied*, 442 U.S. 917. The Government suggested that it desired to offer such testimony both in connection with the issue of probable cause (the Trial Court having carried Petitioners' motion to suppress evidence with the case) and in the presence of the jury "to show the results and acts that were taken by the Coast Guard personnel themselves, that is, what they did based upon these transmissions" (R. 3: 244).

However, it thereafter developed that Quartermaster Huse had no independent recollection of the communications with respect to which he testified but that his testimony was drawn exclusively from handwritten notes that he had prepared (R. 3: 282-83). He also stated that he was unable to differentiate between those communications that he had actually heard himself and those that had been heard by the radio operator (Buchhorn) and then relayed to him for paraphrased transcription (R. 3: 242; 283-84; 361; 373). Thus, Huse specifically admitted that "some of these notes were basically what Mr. Buchhorn told [him]" (R. 3: 284).

Thereafter, Petitioners specifically objected to the introduction of Huse's testimony before the jury on the grounds that (a) the radio transmissions themselves were only conditionally relevant and had not properly been authenticated, as required by Rules 104(b) and 901(a) of the Federal Rules of Evidence, because there had been no affirmative showing by substantial independent evidence that the communications originated with or involved any

of the Petitioners or otherwise related to the alleged conspiracies on trial; (b) such transmissions, to the extent they contained extra-judicial assertions of fact, were hearsay and their admission would violate the *James* mandate because there had been no showing either that the statements were made in furtherance of the conspiracies alleged or that any Petitioner had knowingly participated in such alleged conspiracies, and (c) given Huse's admission that a portion of the notes he had made were based on the hearsay communications of another person (Buchhorn), and that he had no independent recollection of any of the facts contained in his handwritten notes, his testimony itself plainly constituted double hearsay and was therefore inadmissible (R. 3: 301-309).

The Trial Court overruled the third objection and conditionally overruled the first two objections, allowing the testimony before the jury but requiring the Government to establish a "nexus" between the vessels in question, the radio transmissions and Petitioners (R. 3: 314-15).

Quartermaster Huse was thereupon permitted to testify in the presence of the jury essentially to the same series of radio communications about which he had previously testifed (R. 3: 317-44). Over renewed objection that the testimony was hearsay, he was further allowed to testify to the purported communications concerning the position heading and alleged activities of "115" (R. 3: 328-29) and to explain to the jury his plotting of the LORAN navigational coordinates on a nautical chart reflecting the position of the LITTLE AL approximately ten miles south-southeast of the Buccaneer Rigs (R. 3: 343-52). On cross-examination he admitted that it was possible that there were not, in fact, four separate sources of radio trans-

missions but simply one or more individuals using different identifying names (R. 3: 357-58), that none of the voice transmissions were identifiable or attributable to any particular individual (R. 3: 362, 365) and that, apart from the LORAN coordinates, he was unable to state with any degree of assurance the geographical location from which the transmissions originated (R. 3: 354-55, 366).

All 12 individuals arrested aboard the TYRANT III and the DORADO were convicted at trial and sentenced to varying terms of imprisonment and fines. On appeal, the Court of Appeals reversed seven of the convictions, concluding that the evidence was insufficient. The Court affirmed Petitioners' convictions, rejecting claims that the evidence was insufficient as to them and that the Trial Court had committed prejudicial error by admitting evidence of the radio communications, over proper and timely defense objection, without the authentication demanded by the Federal Rules of Evidence and despite the absence of any independent corrobative evidence of the conspiracies alleged in the indictment or of Petitioners' knowing participation in them. Conceding that the evidence was "scarcely crushing," 678 F.2d at 610, the Court of Appeals nevertheless concluded that "in view of the strength of the evidence against those whose convictions we affirm, any error in admitting these rather ambiguous [radio] transmissions was harmless. The same is true of [Petitioners'] third objection to some of this evidence as double hearsay." 678 F.2d at 612.

Thus, baldly stated, the Court of Appeals concluded that what might otherwise have been prejudicial error in the admission of evidence was nevertheless "harmless" under Rule 52(a) of the Federal Rules of Criminal

Procedure because—and apparently only because—the other, independent evidence of guilt (while "scarcely crushing") was minimally sufficient to sustain the convictions.

REASONS FOR GRANTING THE WRIT

Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." At least since *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946), this standard of harmlessness has demanded that the reviewing court conclude that "the error did not influence the jury, or had but very slight effect." See, e.g., *United States v. Heller*, 625 F.2d 594, 599 (5 Cir., 1980); *United States v. Underwood*, 588 F.2d 1073, 1076 (5 Cir., 1979).

The circumstances in which harmlessness may appropriately be found in accordance with Rule 52(a) are limited. *DeLuna v. United States*, 308 F.2d 140, 155 (5 Cir., 1962), *rehearing denied*, 324 F.2d 375 (5 Cir., 1963). Invariably the Courts of Appeals, in cases involving a claim that prejudicial evidence has been erroneously admitted over proper and timely defense objection, have limited the application of Rule 52(a)'s harmless error doctrine to instances in which (i) the evidence was merely cumulative of other evidence properly admitted or admitted without objection; (ii) the character of the error, evaluated in the context of the entire record, was trivial or insignificant in its impact on the rights of the accused, or (iii) the independent evidence of guilt was overwhelming, thereby implying that the erroneously admitted evidence could have had no

measurable impact on the jury's deliberations. See, e.g., *United States v. Lynn*, 608 F.2d 132, 135-36 (5 Cir., 1979); *United States v. Williamson*, 450 F.2d 585, 591 (5 Cir., 1971), *cert. denied*, 405 U.S. 1026; cf. *Harryman v. Estelle*, 616 F.2d 870 (5 Cir., 1980) (en banc), *cert. denied*, 449 U.S. 860 (constitutional error found harmless beyond a reasonable doubt in view of alleged "overwhelming evidence of guilt" of accused).

In the present case, by contrast, the Court of Appeals has apparently now extended the harmless error doctrine to every instance in which the independent evidence of guilt has been found to be sufficient to support a Federal criminal conviction under the standard prescribed by *Glasser v. United States*, 315 U.S. 60 (1942). Indeed, the Court of Appeals advances no other explanation for its conclusion that within the context of the entire record the erroneously admitted evidence was "harmless." The clear implication of its holding is that, in every case in which the evidence is otherwise minimally sufficient to support the conviction, any error in the admission of evidence will be disregarded. Such a conclusion is a manifest and unwarranted perversion of Rule 52(a).

It cannot seriously be maintained that the error in admitting testimony concerning the radio communications was not prejudicial or somehow did not affect the substantial rights of Petitioners. Despite the Government's inability to demonstrate, as required by Rule 104(b) of the Federal Rules of Evidence, that any Petitioner was responsible for any of the radio transmissions in question, or that such transmissions were in fact what the Government claimed they were (i.e.,

anonymous communiques between participants in a marihuana smuggling operation), the Court of Appeals nevertheless sanctioned their admission into evidence, thereby permitting the jury to speculate that Petitioners were, in fact, somehow connected with the transmissions.

The Court of Appeals likewise casually allowed Huse to testify not only to what he personally had heard but also to what his radio operator, Buchhorn, said he heard, in plain contravention of the hearsay rule. The integrity of the Federal Rules of Evidence can hardly be maintained if violations as egregious as this one can be swept under the rug as mere "legal technicalities." Given Huse's inability to recall independently the communications he logged, there was simply no discernible basis for admitting his testimony. In such circumstances the obvious hearsay violation, coupled with its equally obvious prejudicial effect, demanded that the testimony be excluded.

The Court of Appeals' misapplication of the harmless error doctrine is, finally, compounded by the utter inadequacy of the evidence to establish the guilt of any of the Petitioners beyond a reasonable doubt. At most the Government proved no more than physical proximity to contraband, a circumstance that has never been regarded as sufficient to establish knowing participation in a conspiracy. *United States v. Malatesta*, 590 F.2d 1379, 1382 (5 Cir., 1979) (en banc), *cert. denied*, 440 U.S. 962; *Hamling v. United States*, 418 U.S. 87, 124 (1974); *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Macker*, 608 F.2d 223, 227 (5 Cir., 1979); *United States v. Glasgow*, 658 F.2d 1036, 1040 (5 Cir., 1981); *United States v. Marx*, 635 F.2d 436 (5 Cir., 1981). In circumstances as equivocal

as these, the misapplication of Rule 52(a) is particularly unwarranted and substantially erodes the integrity of the Federal Rules of Evidence. Unless objections during the course of a criminal trial are to become a meaningless, formalistic exercise in futility, the substantial prejudicial error presented by the record in this case cannot be passed off as harmless.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that their petition for a writ of certiorari in this cause be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Peter James SCOTT, Don Richard Rainey, Steven Clyde Watson, Daniel Edwin White, Gary Lee Anderson, Charles Joseph Howard, Julio Rodrigues, Pedro Aparicio, Luis Garcia, Charles Thomas Pollard, Fermin Gomea Polo and Lawrence W. Griffith,
Defendants-Appellants.

No. 81-2397

UNITED STATES COURT OF APPEALS
Fifth Circuit.

June 18, 1982.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

Twelve appellants seek reversal of their convictions of conspiracy to import and to possess, with intent to distribute, over fifteen tons of marihuana. Their primary complaint is of the sufficiency of the evidence to support the convictions. Concluding that it is sufficient to support five of the convictions only and that the other points raised by these five do not warrant reversal, we affirm as to them and reverse as to the others.

Facts

On March 31, 1981, Appellant Pollard inquired locally regarding pleasure boats available for purchase in the area of Freeport, Texas, inspecting two of them the same day. He indicated an interest in a fishing charter-boat venture, in personal use, and in a possible tax write-off. The following day, after a fifteen-minute tour of the vessel, he agreed to purchase the 41-foot Hattaras class TYRANT III for a total of $78,500.00, payable the following day by cashier's check. On this occasion, he was accompanied by appellant Scott. The next day, an hour late for the closing, he called the seller, advising that he was running late and inquiring if cash would be acceptable. Told that it was, he and another individual arrived and paid in full. The seller offered to accompany Pollard to the Coast Guard station to register the title transfer and to give Pollard a receipt for his cash. Pollard refused both, saying that he trusted the seller by reputation and that he wished to find a place to moor the boat. They agreed to meet the next morning for the seller to remove his personal property from the boat, Pollard taking the ignition keys and unexecuted title papers.

That morning, April 3, found the TYRANT III gone, however, not to return that day or the next. On the evening of April 5, the seller called Pollard's home, reaching his wife, who told him that Pollard had left three days before to fish. In response to the seller's complaints about his missing personal property and expressed intent to contact the Coast Guard, Mrs. Pollard requested that he not do so—an action that seemed strange to the seller in view of Pollard's long absence in rough weather. She promised on Pollard's behalf that the property would be

returned by noon the next day. By the afternoon of that day, however, TYRANT III was in the hands of the Coast Guard, as we shall see.

In the meantime, Pollard had purchased yet another small pleasure vessel, the 45-foot DORADO, after a brief inspection. Payment of $107,000.00 cash was made on April 2. Pollard, accompanied again by appellant Scott, accepted a receipt for the sum but postponed transferring title. Next evening, Scott and appellant White departed in it, returning in the early hours of April 5, a Sunday. At that time, they were seen in the company of appellant Griffith. Early that Sunday afternoon, DORADO left the slip, never to return.

Earlier that Sunday morning, the Galveston Coast Guard station had begun to pick up unusual signals on a frequency which it was monitoring, 14.3670 megahertz. These were between two stations described only as "105" and "115," 105 being apparently shore-based and 115 being a vessel trying, with some difficulty, to rendezvous with two others in the Gulf of Mexico. At one point on the morning of Monday, April 6, 105 inquired of 115 whether it had on its radar screen an offshore oil field known as the Buccaneer Rigs. 115 responded affirmatively and stated: "I am at 5622 and 1081.5. You know what I mean." From this communication the Coast Guard operator assumed these numbers referred to partial Loran-C navigational positions; and they plotted 115's gulf location at about 8-10 miles south-southeast of the Buccaneer offshore oil field, beyond Galveston. A Coast Guard helicopter was dispatched to the area. Later that morning the Coast Guard also intercepted radio communications on VHF channel 9 apparently between two surface vessels

identified only as "Deadend" and "Willie Willie." The name Willie had been mentioned several times during the course of communications between 105 and 115.

The Coast Guard helicopter arrived in the vicinity at about 2:16 p. m. Initially, the helicopter crew observed a workboat tied up to the southernmost production platform in the Buccaneer field. Later the crew observed what was subsequently identified as the vessel LITTLE AL, a somewhat battered shrimper, approximately five miles south-southeast of the Buccaneer rigs and the TYRANT III and DORADO some ten miles further east. As the helicopter overflew LITTLE AL at approximately 2:25 p. m., shore-based Coast Guard radio operators overheard the following communication from "115": "Red stripe is here. The same dude." (Obviously a reference to the red stripe marking borne by all Coast Guard surface vessels and aircraft.) Moments later Coast Guard officers overheard "Deadend" inform "Willie Willie" that "Red stripe is here." A short time thereafter, 105 instructed 115 to "go take a ride" with Willie Willie and "take all the papers off."

The Coast Guard helicopter remained in the vicinity to observe the movements of the three vessels. TYRANT III proceeded directly to LITTLE AL and came alongside the larger vessel at approximately 3:09 p. m., remaining alongside for about five minutes. It then departed to the southwest. The Coast Guard helicopter departed the vicinity for refueling shortly thereafter.

In the meantime, the Coast Guard diverted another aircraft, a C-131 stationed at Corpus Christi, to the area. The C-131 was on the scene when the helicopter returned from refueling. The C-131 observed the movements of

LITTLE AL, TYRANT III, and DORADO from approximately 3500 feet altitude. Shortly after 4 p. m., the C-131 observed TYRANT III and DORADO come stern to stern. While they were so rendezvoused, crewmembers on the C-131 observed an object being thrown overboard between the two vessels. After jettisoning the object, the two vessels proceeded away from each other; then after some erratic course maneuvers they again met briefly for a second time. The Coast Guard helicopter subsequently retrieved the object, a roll of heavy plastic sheeting.

While Coast Guard aircraft continued to observe the movements of the vessels, a 41-foot Coast Guard surface vessel arrived, and officers boarded LITTLE AL, which was found to be unmanned but laden with 30,000 pounds of marihuana. They also discovered maps charting a nautical course from the Colombian coast to the vessel's location. Thereupon, the 41-foot Coast Guard vessel moved to intercept TYRANT III and to board her as well. The helicopter intercepted DORADO, which was at that time some four to five miles distant from TYRANT III and instructed it to return to the location of the Coast Guard vessel and TYRANT III to prepare for boarding by the Coast Guard. Officers of the Coast Guard then boarded both vessels. No violations of Coast Guard safety regulations or illegal contraband were found on either, although officers noted that the cabin areas of both vessels had been "stripped," i.e., that there was very little furniture in the cabin areas. Officers also observed sophisticated radio equipment on board.

The captain of the 41-foot Coast Guard vessel did not elect to seize the two sport fishing vessels and their crew

at that time, however. Instead, he was returning to LITTLE AL to retrieve a crewmember left to stand watch when orders were received from the Coast Guard station in Galveston to take TYRANT III, DORADO, and their passengers into custody and escort the vessels back to Galveston.

Sufficiency of the Evidence: Law

Appellants attack the record evidence as insufficient to support these convictions, laying stress on its character as chiefly circumstantial, as indeed it is. Its character as such was once of key significance in our circuit: at one time we tested such evidence by an objective rule, applied by our judges, that to support a conviction such evidence must of itself exclude every reasonable hypothesis other than that of guilt. *See, e.g., Riggs v. United States,* 280 F.2d 949, 955 (5th Cir. 1960). Such evidence was thus subjected to a severe test, one of an all but mathematical quality. This is however, our law no longer. Over a decade ago, in *United States v. Warner,* 441 F.2d 821, 825 (5th Cir. 1971) (per Wisdom, J.), *cert. denied,* 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971), we recognized the command of the Supreme Court[1] that "circumstantial evidence is intrinsically no different from testimonial evidence . . . ." Thus the rule by which it is to be tested is the same as the rule obtaining as to evidence generally: whether a reasonably-minded jury could accept the record evidence as adequate and sufficient to support the conclusion of guilt beyond a reasonable doubt. *United States v. Warner, supra.* We therefore suggest to counsel that in future such differential attacks on evidence as circumstan-

1. *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 139, 99 L.Ed. 150 (1954).

tial be abandoned. As our decision should serve to indicate, they proceed from no specially advantageous ground. Bearing these observations in mind, then, we turn to the quality and quantity of evidence supporting the convictions in hand.

Sufficiency of the Evidence: Facts

Appellants claim the benefit of the well-established rule that "mere presence, association, acquiescence or approval without more is not sufficient to establish that a defendant is a member of [criminal] conspiracy." E.g., *United States v. Macker*, 608 F.2d 223, 227 (5th Cir. 1979). At trial, the evidence presented by the prosecution, in addition to radio communication evidence substantiating the surveillance described above, was: (1) appellants Pollard's and Scott's cash purchase of the TYRANT III on April 1 under suspicious circumstances; (2) appellant Pollard's and Scott's cash purchase of the DORADO on April 2 under like circumstances; (3) the "extraordinary" absence of salon furniture and sailing-fishing equipment from the TYRANT III and DORADO, along with the presence of abundant clear plastic sheeting—both consistent with the presumed loading of marihuana; (4) the TYRANT III's rendezvous with the drug-laden LITTLE AL; (5) the presence of finger and palm prints of appellants Griffith and Aparicio on items found aboard the LITTLE AL; and (6) the fact that both the TYRANT III's and the DORADO's sophisticated radios had dials set at identical frequencies on their radio bands.

This evidence, tested against the standard of "proof beyond a reasonable doubt that a conspiracy existed, that the accused knew it and with that knowledge voluntarily

joined it," *United States v. White*, 569 F.2d 263, 267 (5th Cir. 1978), *cert. denied*, 439 U.S. 848, 99 S.Ct. 148, 58 L.Ed.2d 149 (1978), is scarely crushing. Nevertheless, viewing it in the light most favorable to the jury verdict, we conclude that it is easily sufficient, with regard to the convictions of appellants Pollard, Scott, Griffith, White and Aparicio, for a reasonably-minded jury to find guilt beyond a reasonable doubt. The circumstances surrounding the hasty cash purchases of the two vessels by Pollard and Scott, together with the vessels' subsequent erratic actions at sea certainly go far to "exclude every reasonable hypothesis inconsistent with innocence . . ." *United States v. Bland*, 653 F.2d 989, 995 (5th Cir. 1981), *cert. denied* ____U.S.____, 102 S.Ct. 602, 70 L.Ed.2d 592 (1981). The evidence with regard to appellant Daniel White, who accompanied Scott to pick up the DORADO under apparently surreptitious circumstances is also consistent with knowledge and participation in the conspiracy. Similarly, appellants Griffith and Aparicio's fingerprints on items aboard the LITTLE AL, a drug-laden vessel that had just completed the long voyage from South America, also appears sufficient to support a conviction of conspiracy to import and possess. *See, e.g., United States v. Freeman*, 660 F.2d 1030 (5th Cir. 1981); *United States v. Alfrey*, 620 F.2d 551, 556 (5th Cir. 1980), *cert. denied*, 449 U.S. 938, 101 S.Ct. 337, 66 L.Ed.2d 160 (1980). The question with regard to Griffith and Aparicio is somewhat closer, since the prosecution could not prove *when* these appellants touched the items on the LITTLE AL. While the prints are somewhat consistent with appellants' hypothesis that they both merely boarded the LITTLE AL out of curiosity and promptly left when they realized that it was laden with marihuana, this explanation need

not have been accepted by the jury, given the fact that Griffith's prints were found on several items not likely to have been touched during a cursory inspection of a boat at sea (e.g., a can inside a drawer, a jar in the galley).

With regard to the other appellants, those aboard the TYRANT III or the DORADO when they were seized, the prosecution offered nothing beyond their mere presence. Neither the TYRANT III nor the DORADO contained any drugs whatever, and the prosecution offered nothing to show that these appellants knew of the smuggling operation. For all we know, these people may have simply been hired "to unload a vessel." If so, they may have been wholly innocent of any wrongdoing at the time of arrest, since they would not have discovered that the unloading involved drugs until the operation actually got underway. Unlike Griffith and Aparicio, who we know must have been aware of the drugs aboard the LITTLE AL, and Pollard, White and Scott, who apparently knew of the scheme from the very beginning, the rest of appellants were more like such passengers in an automobile containing concealed contraband as we have in other cases held innocent of possession. *See, e.g., United States v. Ferg*, 504 F.2d 914 (5th Cir. 1974). Their convictions must be reversed.

Other Contentions

Appellants claim, first, that the Coast Guard lacked probable cause to seize the TYRANT III and DORADO and, second, that a determination of the existence of probable cause was improper absent a showing of who ultimately made the decision to seize the vessels. They therefore argue that their arrests were unlawful and all evidence

obtained therefrom should have been suppressed. The prosecution claims that with the exception of appellants Griffith and Aparicio, who provided their fingerprints for comparison with those found on the LITTLE AL, none of the appellants even have standing to assert the legitimate expectation of privacy necessary to invoke a right to suppress. Whether or not the prosecution's claim of lack of standing is correct—and it contains much force—the standing issue is academic.[2] What the Coast Guard observed during its long period of surveillance was amply sufficient to warrant a reasonable person's belief that an offense was being committed. The fact that the particular individual who ordered the seizure was not identified does not prevent an objective evaluation of the facts generally known to the Coast Guard when it acted; and where its agents are in communication with each other, their knowledge may properly be viewed in the aggregate when being tested for sufficiency to base such a conclusion. *United States v. Wright*, 588 F.2d 189 (5th Cir. 1979); *United States v. Nieto*, 510 F.2d 1118 (5th Cir. 1975); *Moreno-Vallejo v. United States*, 414 F.2d 901 (5th Cir. 1969), *cert. denied*, 400 U.S. 841, 91 S.Ct. 82, 27 L.Ed.2d 76 (1970). Finally, appellants claim that it was error to admit evidence of the radio communications of the purported coconspirators because (1) these were only conditionally relevant and were not

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2. Appellants Pollard and possibly others involved in the purchase of the TYRANT III and the DORADO may have shown a legitimate possessory interest in the boats sufficient to permit them to invoke their right to suppress evidence obtained from the seizures. Although legal title to the vessels never passed to any appellant, legal title is not the exclusive means of showing a "legitimate possessory interest." *See, e.g., United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982); *United States v. Whitley*, 670 F.2d 617 (5th Cir. 1982).

authenticated, as required by Fed. R. Evid. 104(b) and 901(a); (2) these transmissions, to the extent that they contained extrajudicial assertions of fact, were hearsay and were admitted in violation of *United States v. James*, 590 F.2d 575 (5th Cir. 1979) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979); and (3) at least part of the evidence was based on double hearsay and was therefore inadmissible.

Appellants' first and second arguments are not without plausibility. All that the prosecution did here was put on a witness who could confirm only that radio communications between unknown parties were indeed overheard. Under Fed. R. Evid. 104(b) and 901(a), however, evidence of, telephone communications must, as a condition precedent to admission, be authenticated by, for example, "evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone." Fed. R. Evid. 901(b)(6). The prosecution here offered nothing to identify the parties to the overheard communications and apparently did not even demonstrate that the radios aboard the TYRANT III, DORADO and LITTLE AL were capable either of communicating with one another or of transmitting on 14.-3670 megahertz or channel 9, VHF. This last prosecutorial omission seems strange indeeed, as the government presumably had all the radio equipment in its possession at the tim[illegible] of trial.

The government's rejoinder to the appellants' argument is that the radio communication evidence came in not to prove the truth of the matter asserted, e.g., that the vessels were indeed at 5622 and 1081.5 Loran-C positions, but to explain why the Coast Guard undertook its investigation. There is precedential support for this position, *see, e.g., United States v. Vitale*, 596 F.2d 688 (5th Cir. 1979), *cert. denied*, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979), and we conclude that, in view of the strength of the evidence against those whose convictions we affirm, any error in admitting these rather ambiguous transmissions was harmless. The same is true of appellants' third objection to some of this evidence as double hearsay. *See United States v. Wilkerson*, 469 F.2d 963 at 968 ("no *reversible* error in admitting this technically *inadmissible* statement of Branum," [emphasis added]; a double hearsay case).

AFFIRMED in part and in part REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2397

D. C. Docket No. CR-G-81-3

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PETER JAMES SCOTT, DON RICHARD RAINEY, STEVEN CLYDE WATSON, DANIEL EDWIN WHITE, GARY LEE ANDERSON, CHARLES JOSEPH HOWARD, JULIO RODRIGUES, PEDRO APARICIO, LUIS GARCIA, CHARLES THOMAS POLLARD, FERMIN GOMEA POLO and LAWRENCE W. GRIFFITH,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before THORNBERRY, GEE and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed as to Peter James Scott, Daniel Edwin White, Pedro Aparicio, Charles Thomas Pollard and Lawrence W. Griffith, and reversed as to Don Richard Rainey, Steven Clyde Watson, Gary Lee Anderson, Charles Joseph Howard, Julio Rodrigues, Luis Garcia and Fermin Gomea Polo.

June 18, 1982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2397

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PETER JAMES SCOTT, DON RICHARD RAINEY, STEVEN CLYDE WATSON, DANIEL EDWIN WHITE, GARY LEE ANDERSON, CHARLES JOSEPH HOWARD, JULIO RODRIGUES, PEDRO APARICIO, LUIS GARCIA, CHARLES THOMAS POLLARD, FERMIN GOMEA POLO and LAWRENCE W. GRIFFITH,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(August 30, 1982)

Before THORNBERRY, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed

in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Thomas Gibbs Gee
United States Circuit Judge